RAMON CERVANTES, Appellant
No. 59,838 v. Appeal from DALLAS County
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for criminal solicitation of capital murder. See Soc. 15.03, V.T.C.A. Penal Code. The jury assessed punishment at fifteen years confinement in the Texas Department of Corrections. The sufficiency of the evidence is not challenged.

The State's principal witness, Michael Moore, testified that on October 5, 1976 he received a phone call from a man who was later identified as the appellant. The appellant indicated to Moore that he wanted a man killed and inquired whether Moore could handle the task. The appellant discussed the amount of money Moore would charge. Appellant gave Moore the business address, a description of two automobiles and their license numbers and a physical description of the intended victim. Appellant also told Moore that although he had already paid someone else several times to complete the job, his money had been stolen, and further if Moore was unable to complete the job, he'd just do it himself. Finally, appellant told Moore he would call back in several days.

Later that same day, Moore went to the address given to him by the appellant. Moore followed a man, fitting the description given him, to a residence on Loch Ness Drive, Dallas. Moore subsequently obtained the intended victim's name, John Ralston, Sr., and phone number and the names and phone numbers of the people who lived on either side of the intended victim, from a criss-cross directory. The appellant was one of Ralston's neighbors. Moore then called John Ralston to warn him. Moore next contacted Lieutenant Roy Westphal to inform him of the telephone call. Moore met with Westphal, Lieutenant Southall and Sergeant Parker at Westphal's home. The police officers asked Moore to cooperate in their investigation, and Moore agreed to record any future telephone conversations.

On October 7, 1976, Moore received a second phone call from the appellant, which he recorded. The appellant told Moore there would be a slight delay because his intermediary had stolen the $1,000 payment intended for Moore. The appellant said he had his brother-in-laws, who worked for the police department, looking for the thief. Appellant indicated he wanted "the guy", Ralston, killed "C.O.D.", or he'd do it himself, because he was tired of losing his money.

On Saturday, October 16, 1976, Southall came to Moore's apartment and instructed him to make a phone call to the appellant. Moore placed the call, however, the appellant was not at home. Later the same day, Moore placed a second call and was able to speak to the appellant. The appellant told Moore that because his phone was bugged, they shouldn't talk. Moore told the appellant he would need a payment because he'd already spent some money. The appellant promised to call Moore on Thursday, October 21, 1976.

On October 21, 1976, Moore did not receive a phone call from the appellant. As a result, Officer Fowler, Officer Touchton, and Southall instructed Moore to phone the appellant. Moore spoke with the appellant's wife and told her to "jump on the appellant with both feet when he returned" and have him call Moore.

On Saturday, October 23, 1976, Moore placed a call to the appellant at 2:30 a.m., without the direction of the police. Moore asked the appellant why he had not returned Moore's phone call. Moore indicated to the appellant he wanted to get the ball rolling. He then told the appellant to look in his mailbox because he'd find a beer cup Moore had placed there. Appellant had never told Moore where he lived. Moore explained to the appellant that he wanted to know as much about the people he does business with as those he does business on. Moore told the jury he placed the beer cup in appellant's mailbox because he was tired of waiting around and was afraid the appellant would shoot Ralston.

Later that morning at 8:30, the appellant returned Moore's call. The appellant told Moore he had an additional job for him. The appellant wanted another

man badly beaten and his legs broken. Moore requested that he and appellant meet face to face to discuss their business.

At 1:30 p.m. that day, appellant again called Moore to make arrangements to meet. Appellant again requested Moore to put a second man in the hospital, in addition to the intended killing. Moore and appellant agreed to meet in the parking lot of a Denny's Restaurant at 2:30 that afternoon.

Officer Southall equipped Moore with a body mike in order to tape the conversation at the meeting. The officers also brought a surveillance vehicle to the parking lot in order to videotape the meeting. Southall searched Moore to verify that he had no money with him when he went to the meeting.

The recording of the conversation during the meeting revealed the following: the appellant told Moore that he used to tape single-edged razor blades between his fingers and slap people across the face. He also liked to take a blade and cut people across the forehead and when blood ran into their eyes he would then "kick the hell out of them."

The appellant also indicated that he wanted John Allen Ralston, the son of the intended victim, to be put into the hospital by Moore, for the same amount of money being paid to kill John C. Ralston.

Regarding the murder for hire, the appellant discussed how Moore might kill the intended victim. Appellant said he had aimed a gun at Ralston before but because of his poor eyesight, Ralston had not seen him. The appellant suggested that Moore stab or shoot Ralston or use any method Moore preferred; however, the appellant prefered that Ralston be put in a concrete jacket and thrown in the river. The appellant told Moore to go ahead and kill Ralston that night because he had arranged to be out of town. The appellant gave Moore two hundred dollars during this meeting.

The appellant was arrested the following evening at his home.

The appellant testified that during the initial phone call he did not request Moore to kill anyone. The appellant said Moore indicated he could "hassle" the intended victim. The appellant told the jury he realized the idea was crazy and intended to abandon the plan. The appellant assumed after the first call he'd never hear from Moore again because Moore did not have the appellant's name or phone number. The appellant asserted that Moore made several unrecorded phone calls to his home prior to the appellant's October 7th phone call to Moore. The appellant explained that he told Moore, in the October 7th conversation that someone had stolen his money in order to discourage Moore. The appellant thought if Moore knew he had no money, Moore would quit calling. The appellant said he had no intention of ever calling Moore again after the conversation on October 7th.

Regarding the subsequent calls from Moore, the appellant said he told Moore the phone was bugged to further discourage him. When Moore began asking the appellant for money, the appellant said he felt he was being blackmailed. Because of the October 23rd phone call from Moore at 2:30 a.m., the appellant said he felt his family was endangered. The appellant felt the only way to get rid of Moore was to pay him two hundred dollars, hoping Moore would no longer call the appellant.

In the first three grounds of error appellant contends the court erred by restricting his cross-examination of the State's principal witness, Moore, which would have shown his bias and motive for testifying at the trial. Ground of error one argues the appellant should have been allowed to cross-examine Moore regarding the dismissal of a weapons charge to establish that the dismissal was in return for his cooperation with the Dallas Police Department. In a pre-trial hearing on the State's Motion in Limine, it was adduced that Moore had been charged on October 29, 1974 with the offense of unlawfully carrying a weapon; however, this charge was dropped in January of 1975. In ground of error two the appellant contends that cross-examination of Moore by the appellant regarding the dismissal of an assault charge should have been allowed. Moore had been

charged with the offense of assault on September 13, 1976. This charge was dismissed on October 6, 1976, one day after appellant's initial contact with Moore. The record reveals that an affidavit of non-prosecution in the assault case was signed by the complaining witness on September 17, 1976. Appellant also argues cross-examination regarding Moore's prior arrest record would have shown Moore's history of violence and cooperation with the police and, therefore, establish his motive for cooperating with police in the instant case.

Great latitude should be allowed the accused to show a witness' bias or motive for testifying against the accused. See *Rovinsky v. State*, 605 S.W.2d 478 (Tex.Cr.App. 1980); *Carrillo v. State*, 591 S.W.2d 876 (Tex.Cr.App. 1979); *Coleman v. State*, 545 S.W.2d 831 (Tex.Cr.App. 1977). Trial courts, however, are allowed considerable discretion over the extent to which a witness may be cross-examined on a collateral matter for the purpose of showing bias and possible motives for fabrication. See *Rovinsky v. State*, *supra*; *Carrillo v. State*, *supra*.

In general, unadjudicated criminal offense may not be used to impeach a witness in a criminal case. See Art. 38.29, V.A.C.C.P.; *Bilbrey v. State*, 594 S.W.2d 754 (Tex.Cr.App. 1980); *Carrillo v. State*, *supra*. Evidence of pending charges against a witness, however, is admissible under certain circumstances because the witness' vulnerable status affords a basis for an inference of undue pressure, thus showing the possibility of interest and motive of the witness for testifying as he did. See *Randle v. State*, 565 S.W.2d 927 (Tex.Cr.App. 1978); *Castro v. State*, 562 S.W.2d 252 (Tex.Cr.App. 1978); and *Evans v. State*, 519 S.W.2d 252 868 (Tex.Cr.App. 1975).[1]

[1]Appellant also cites Davis v. Alaska, 415 U.S. 308, S.Ct. 1105, 39 L.Ed.2d 347 (1974). In *Davis*, the United States Supreme Court held the defendant should have been allowed to present evidence of the witness' status as a juvenile probationer at the time of his testimony. In the instant case, Moore admitted on cross-examination before the jury that he was on probation at the time he was cooperating with the police on the instant case.

Further, in *Simmons v. State*, 548 S.W.2d 386 (Tex.Cr.App. 1977), this Court held that the trial court erred by refusing to permit the defendant to perfect a bill of exceptions as regarding three prior arrests, even though the charges had been dismissed. This Court stated that the defendant should have been permitted to explore the possibility, in a bill of exceptions, that the dismissal of the charges was a quid pro quo for the witness' testimony. Additionally, this Court noted the charges could have been refiled, thus suggesting possibility of pressure on the witness. Subsequently, this Court in *Carrillo v. State, supra*, distinguished *Simmons*, stating that although the prosecution witness in *Carrillo* was still subject to prosecution for receiving stolen property because the statute of limitations had not run, the defendant had been permitted to fully explore in his bill of exceptions the possibility that no charges had been brought against the witness as a quid pro quo for their testimony. Further, this Court, indicated because this exploration presented no evidence of any agreement between the State and prosecution witnesses, the defendant was asking the trial court to permit him to impeach the prosecution witness on the basis of speculation as to the pressure the witnesses might have felt to testify favorably for the state.

This Court's reasoning in *Carrillo v. State, supra*, is applicable to the instant case.

In the instant case, the appellant was allowed to fully explore Moore's prior arrest record and the dismissal of charges in a bill of exception. The appellant also was allowed to cross-examine Moore, outside the presence of the jury, as to whether his cooperation with the police was prompted by an agreement with the State to avoid prosecution. Moore denied ever discussing with Officer Westphal, the weapons charge that was pending against him while he was acting as an informant for Westphal. Moore further stated Westphal was not aware of any charges pending against him. The cross-examination of Moore before the jury revealed that Moore had been in

fights, put people in the hospital and carried a gun on occasion. Moore admitted that he was on felony probation at the time that he was having the telephone conversations with the appellant. Moore indicated that Lieutenants Westphal and Southall had told him they would send letters to the probation office in order to help him obtain early release from probation. Such letters, however, were never sent. Although Moore admitted to working for Westphal as an informant in the past, he denied receiving any favors or help in relation to that prior action as an informant. In the bill of exception, Moore's probation officer testified he never spoke with any officers regarding the discharge of Moore from probation. In the absence of any evidence linking the dismissal of charges against Moore to his cooperation in the investigation of appellant, the trial court did not abuse its discretion in excluding the profferred impeachment testimony. See *Carrillo v. State, supra.* As this Court stated in *Carrillo v. State, supra*, the appellant was asking the trial court to permit him to impeach Moore on the basis of speculation as to the pressure he might have felt to cooperate in the investigation and to testify favorably.

Grounds of error one, two and three are overruled.

Ground of error four contends the trial court erred in excluding impeachment evidence that the witness Moore had been arrested for impersonating a police officer. Unadjudicated criminal offenses may not be used to impeach a witness in a criminal case. See Art. 38.29, V.A.C.C.P. *Carrillo v. State, supra*; *Murphy v. State*, 587 S.W.2d 718 (Tex.Cr.App. 1979). In *Simmons v. State, supra*, the court held the defendant should have been permitted to explore the dismissed charges because they could have been refiled, while in the instant case the statute of limitations on the arrest for impersonating a police officer had run and the charges could not be refiled.[2]

[2]Moore had been arrested in 1973 for impersonating an police officer four years prior to the trial. See Art. 12.01 (4), Vernon's Ann.C.C.P.

Ground of error five contends the court erred in failing to suppress evidence of extraneous offenses which were admitted on the tape recordings of appellant's conversations with Moore on October 23, 1976 during the meeting at Denny's Restaurant. Appellant had boasted that he used to slap people on the forehead with razor blades and cut them on the forehead with knives so blood would run into their eyes. He also told how he had aimed guns at the intended victim without being seen.

Generally, evidence of extraneous offenses committed by the accused are inadmissible; however, refutation of a defensive theory is a recognized exception to that general rule. *Thrush v. State*, 515 S.W.2d 122 (Tex.Cr.App. 1974); *Powers v. State*, 508 S.W.2d 377 (Tex.Cr.App. 1974); *Albrecht v. State*, 486 S.W.2d 97 (Tex.Cr.App. 1972). In the instant case the appellant's testimony raised the defense of duress and entrapment. Although evidence of other criminal acts is no longer admissible to rebut the claim of entrapment, *Bush v. State*, 611 S.W.2d 428 (Tex.Cr.App. 1981); *Langford v. State*, 571 S.W.2d 326 (Tex.Cr.App. 1978), such evidence is admissible to rebut the defense of duress. This Court must, however, determine what extraneous offenses were admissible to refute the defense of duress. In *Albrecht v. State*, 486 S.W.2d 97 (Tex.Cr.App. 1972), this Court stated the relevant question is whether the extraneous offense tends to disprove the appellant's explanation of the primary offense. The presence or absence of similarity does not completely determine the admissibility of the extraneous offense. The extraneous offense, if relevant in tending to disprove the defensive theory, should be admissible. See *Halliburton v. State*, 528 S.W.2d 216 (Tex.Cr.App. 1975), (opinion on rehearing). The essence of the conversation in question indicated that the appellant was discussing and suggesting the manner in which the killing might be accomplished. Discussing the best place to commit the murder, the appellant commented on the poor eye sight of the victim and told how he had aimed guns at him without being seen. He indicated to Moore that if Moore

could get Ralston's glasses off, Ralston would not be able to see, thus making him easier to kill. Pointing the gun at the victim was not unrelated to the offense on trial and, therefore, the conversation relating to it was admissible. *Thrush v. State, supra.*

Regarding the conversations referring to the razor blade incidents, this Court has held that extraneous offenses could be admitted:

> (1) To show the context in which the criminal act occurred—what has been termed the 'res gestae'—under the reasoning that events do not occur in a vacuum and that the jury has a right to hear what occurred immediately prior to and subsequent to the commission of that act so that they may realistically evaluate the evidence . . ." *Albrecht, supra* at 100.

In *Saunders v. State*, 572 S.W.2d 944 (Tex.Cr.App. 1978), this Court held the extraneous offenses included in the tapes were inadmissible because they revealed both the tenor and setting in which the conversations between the defendants and the officers took place. In the instant case, the challenged conversations showed the context in which the criminal activity occurred. The appellant referring to the razor blade incidents, explained to Moore that he was no longer a pro at this sort of thing, therefore, he needed someone else to do his work for him because he had not kept up on new techniques. Thus, the extraneous offenses involving razor blades and cuttings were admissible under the exception contained in *Albrecht*, set out above. *Saunders, supra*; *Calverly v. State*, 511 S.W.2d 60 (Tex.Cr.App. 1974).

Ground of error six contends the trail court erred in unreasonably limiting the voir dire examination of the prospective jurors. Specifically, the appellant asserts he should have been allowed to question the members of the voir dire individually regarding their ethnic prejudices.

Under Art. 35.17, V.A.C.C.P. it is within the court's discretion to direct the State and defendant to conduct the voir dire examination of prospective jurors in the presence of the entire panel. Only in a capital felony case must the trial court, on demand by the State or defendant, allow examination of each juror on voir dire individually and apart from the entire panel. See *Brantley v. State*, 522 S.W.2d 519 (Tex.Cr.App. 1975); *Wechsler v. State*, 361 S.W.2d 379 (Tex.Cr.App. 1962).

In the instant case, the trial court did not restrict any specific questions presenting the matter of prejudice to the jury. On the contrary, the appellant was allowed to ask the following:

> "Is there anyone who because of any reason has any type of prejudice or ill feelings toward a Mexican-American because of his ethnic background? Yes, sir, and what is your name, please, sir?
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> MR. MOORE: Dean Moore.
>
> MR. SCOGGINS: Dean Moore?
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> MR. MOORE: Uh-huh.
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> MR. SCOGGINS: Mr. Moore, I'll then, as I stated, ask you the second question, if this feeling that you have, can you set this aside and if you sit in judgment on this Mexican-American, could you do this fairly and impartially without regard to whatever your other ideas may be? Or is it the type of matter in which you feel like that you probably shouldn't sit in judgment of your fellow man?"
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> * * *
>
> ... Now let me ask the first question again: Is there anyone who does have a prejudice against a Mexican-American because of the group that they happen to fall into? Is there anyone else? Or let me rephrase the question in a different manner: Is there anyone here who has a particular bias or

prejudice in favor of a Mexican-American that would give him a greater benefit of the doubt than he might be entitled to after hearing the evidence? Is there anyone who is of that opinion? I take it by your silence then that the group that I'm talking to, no one here would be influenced because the man whose case is called to trial is a Mexican-American, and I appreciate that fact and I'm sure the Prosecution does as well."

Prior cases reversed by this Court for the limitation of voir dire examination in a non-capital felony, were done so because the trial court refused to allow the asking of a particular question. *Emanus v. State*, 562 S.W.2d 806 (Tex.Cr.App. 1975). There was no such limitation of questioning in the instant case,[3] therefore, the trial court did not abuse its discretion in directing that the voir dire examination be conducted in the presence of the entire panel. *Johnson v. State*, 447 S.W.2d 927 (Tex.Cr.App. 1969). This ground of error is overruled.

Ground of error seven contends the trial court erred in not finding entrapment as a matter of law.

In the instant case, the issue of entrapment was raised by the appellant's testimony that he had given up the idea of killing Ralston and that had it not been for Moore's repeated phone calls and requests for money, he never would have met with Moore nor given him any money. When determining whether there was entrapment as a matter of law, the trial court must first determine whether there was an inducment. If the court determines there was an inducement, the court then need only consider the nature of the police activity involved without reference to the predisposition of the particular defendant. In the

[3]The U.S. Supreme Court stated in Restairo v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), that voir dire questioning directed to racial prejudice is not constitutionally required absent circumstances comparable in significance to those existing in Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

present case, the State contradicts the appellant's evidence of inducement. Once the appellant contacted Moore to initite the scheme, the fact that Moore provided an opportunity for the appellant to continue was not entrapment as a matter of law.

Evidence on the issue of entrapment was in conflict so it was properly submitted to the jury. *Poe v. State*, 513 S.W.2d 545 (Tex.Cr.App. 1974); *McKelva v. State*, 453 S.W.2d 298 (Tex.Cr.App. 1970).

Ground of error eight contends the trial court erred in admitting evidence of tape-recorded conversations between the appellant and Moore. Appellant first contends the challenged evidence violated his constitutional and statutory rights to be free from unreasonable searches and seizures, arguing that Art. I, Sec. 9 of the Texas Constitution or Art. 38.23, V.A.C.C.P. affords greater protection than the United States Constitution.

In *Schwartz v. State*, 426 S.W.2d 174 (Tex.Cr.App. 1951), aff'd 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952), this Court, considering a predecessor to Art. 38.23, held recordings of conversations obtained with the permission of one party to the conversation was not obtained in violation of the State or Federal Constitution or the Statutes of Texas and were therefore admissible. *Saunders v. State*, 572 S.W.2d 944 (Tex.Cr.App 1978); *Thrush v. State, supra*. The admission of the recordings did not violate the Texas Constitution or statutes.

The appellant also urges the admission of the tapes violated his right to due process, citing *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) in support of his argument. The Supreme Court in *Russell*, referring to entrapment, stated only that some day that Court may be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would bar even the initiation of prosecution. In the instant case, we did not find entrapment as a matter of law. Furthermore, as in *Russell*, the police conduct in the instant case in

obtaining the tape recordings "stops short of violating that 'fundamental fairness, shocking to the universal sence of justice,' mandated by the Due Process Clause of the Fifth Amendment." *United States v. Russell, supra* at 432; 93 S.Ct. at 1643, 36 L.Ed. at 373. This ground of error is overruled.

Ground of error nine asserts the trial court erred in refusing to instruct the jury to disregard the prosecutor's question referring to defense experts, because such question was an attempt to bolster the credibility of unimpeached tapes. During the cross-examination of the appellant, the prosecutor asked the following:

> Q. Now, you've heard these tapes before the trial, is that correct? You've heard—
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> A. Part of them.
>
> Q. Part of them. Well, you know that the Judge has ordered me to turn the tapes over before the trial and I've turned them over to your attorney, copies of them; he made copies of them, is that correct?
>
> A. My attorney's been handling that portion of it.
>
> Q. And you hired an expert to examine these tapes.
>
> A. My attorney—

Appellant's objection was sustained, however, the trial court failed, as requested by the appellant, to instruct the jury to disregard the question.

This Court has held the mere asking of a question will not call for reversal unless the same results in obvious harm to the defendant. *Rodriguez v. State*, 577 S.W.2d 491 (Tex.Cr.App. 1979); *Ashley v. State*, 527 S.W.2d 302 (Tex.Cr.App. 1975); *Fuller v. State*, 501 S.W.2d 112 (Tex.Cr.App. 1973). In the instant case, the appellant's objection was sustained and the matter was not pursued by the prosecutor. Although the trial court did not

instruct the jury to disregard the question, we do not find the question was so obviously prejudicial as to require reversal. This ground of error is overruled.

In ground of error ten the appellant contends the trial court committed fundamental error in failing to define "capital felony" in its charge to the jury. The trial court did define capital murder, in its charge. Because the record reflects that no objection was made to the charge at trial, our review is limited to fundamental error. In *Jackson v. State*, 591 S.W.2d 820 (Tex.Cr. App. 1979), this Court stated:

"A jury charge is fundamentally defective when it:

> (1) authorizes conviction without proof of an allegation in the indictment which is required to be proved;
>
> (2) authorizes conviction on a different theory than alleged in the indictment and on additional unalleged theories;
>
> (3) authorizes conviction on the theory alleged in the indictment and on additional unalleged theories;
>
> (4) authorizes conviction for conduct which is not an offense."

Failing to define a term did not authorize a conviction in one of the four fundamentally defective manners as set out above. See *Jackson v. State*, *supra*; *Cumbie v. State*, 578 S.W.2d 732 (Tex.Cr.App. 1979). This ground of error is overruled.

In his final ground of error appellant contends the trial court committed fundamental error in its charge by omitting a culpable mental state, thereby authorizing conviction on less than all the facts alleged in the indictment. The indictment, in pertinent parts, reads as follows:

> "...did then and there unlawfully then and there with *intent* that a capital felony be committed, namely, capital murder by employment of another to commit murder for the promise of remuneration, the said defendant *intentionally* requested and attempted to induce Michael Moore to engage in specific conduct that under the circumstances surrounding the conduct of Michael Moore, as the defendant believed them to be, would make Michael Moore a party to the commission of the said felony, to-wit: the said defendant *intentionally* requested and attempted to induce Michael Moore to commit the murder of John C. Ralston for the promise of remuneration, to-wit: $2,000.00 current money of the United States of America." (Emphasis added)

The indictment included the culpable mental state three times. The court charged the jury in the terms of the indictment, however, omitted the first "intentional." Although the culpable mental state, intentionally, was omitted once in the charge, it is included two other times. In *Daniel v. State*, 486 S.W.2d 944 (Tex.Cr.App. 1972), this Court stated:

> "the charge should be viewed as a whole, and review should not be limited to parts of the charge standing alone."

Considered in its entirety, the charge does not present fundamental error. See *Williams v. State*, 535 S.W.2d 352 (Tex.Cr.App. 1976). Compare *West v. State*, 567 S.W.2d 515 (Tex.Cr. App. 1978) where the charge was fundamentally defective because nowhere in the charge was a culpable mental state included. We overrule this ground of error.

The judgment is affirmed.

PER CURIAM

Delivered April 14, 1982

By: Panel 2; 1st Quarter, 1981

Carl E. F. Dally, Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge

APPENDIX
30

ORDER DENYING MOTION FOR REHEARING

AND

GRANTING STAY OF MANDATE FOR 30 DAYS

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, May 26, 1982

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's Motion for Rehearing in Cause No. No. 59,838 RAMON CERVANTES

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk

GROUND OF ERROR NO. 6

THE COURT ERRED IN UNREASONABLY LIMITING THE VOIR DIRE EXAMINATION OF THE PROSPECTIVE JURORS IN VIOLATION OF APPELLANT'S RIGHTS UNDER ARTICLE 1, SECS. 10, 15, AND 19 OF THE TEXAS CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Although both sides were allowed to address the panel of prospective jurors as a group, the trial judge forbade the directing of questions to panel members individually (S.F. 4), to which Appellant excepted (S.F. 4). Prior to beginning his own voir dire examination of the panel, defense counsel renewed his objection and tendered a list of questions he wished to ask each prospective juror (S.F. 35-38). One of the most important questions counsel was refused the right to ask concerned the existence in any venireman's mind of racial prejudice toward Spanish-surnamed individuals (S.F. 36). Because of the limitations imposed by the court, counsel was unable effectively to exercise his peremptory strikes. Although no harm resulting from an error such as this need be shown, *Emanus v. State*, 526 S.W.2d 806 (1975), *Smith v. State*, 513 S.W.2d ;823, 826 (1974). Appellant later learned that several unacceptable jurors, including a 32nd degree mason, were seated on the jury (Appellant's Second Amended Motion for New Trial, Tr. 124, 126).

This case thus presents an error in the unreasonable restriction of voir dire examination, not in an erroneous ruling on a challenge for cause. The case is therefore controlled by *Emanus v. State, supra*, where it was said:

> "The test for ascertaining harm in (cases of restricted examination) is whether the trial judge's limitation of the voir dire examination amounted to an abuse of discretion, thus depriving Appellant of a valuable right."

APPENDIX C
EXCERPT FROM APPELLANT'S ORIGINAL BRIEF

Id. at 808. If the proferred questions in this case were proper for individual voir dire, the harm arose in preventing the Appellant from intelligently exercising his peremptory strikes. See *Smith v. State*, 513 S.W.2d 823 (1974); *Burkett v. State*, 516 S.W.2d 147 (1974).

Recent guidance on the propriety of Appellant's proposed questions can be found in the cases of *Florio v. State*, 568 S.W.2d 132 (No. 54,084; July 12, 1978); *Hernandez v. State*, 563 S.W.2d 947 (No. 52,802; April 12, 1978); and *Trevino v. State*, ___ S.W.2d ___ (No. 54, 148; April 5, 1978), all involving an unreasonable restriction of the voir dire examination which amounted to an abuse of discretion. In all three cases, the defendants were refused the right to ask prospective jurors if they would more readily believe police officer witnesses. It will be remembered that Appellant was refused the right to ask individual panel members about their social prejudices. Any doubt that this is a proper area for voir dire inquiry can be resolved by the cases of *Salazar v. State*, 562 S.W.2d 480 (1978)(where reversal was required when a juror failed to reveal during voir dire in an indecency with a child case that he had witnessed a Mexican-American sexually attack his own daughter); and *Abron v. State*, 523 S.W.2d 405 (1975)(where a black defendant accused of raping a white woman was refused the right to question prospective jurors about specific racial prejudices.).

The trial court's limitation of Appellant's voir dire examination of the prospective jurors was therefore erroneous. Since the trial judge did not prohibit any specific voir dire questioning, but instead limited the examination of the prospective jurors to surveying the panel as a whole, the issue narrows whether the denial of Appellant's motion for individual voir dire examination (S.F. 35-38) was an abuse of discretion of the same magnitude as an unreasonable prohibition of substantive questions.

While Appellant *was* permitted to question the panel at length (S.F. 40-80) on the issues of racial prejudice, inferences of guilt from the indictment or the seriousness of the charged offense, entrapment, and prejudice in

favor of law enforcement officers, this group interrogatory was ineffective and inadequate. The record shows, for instance, that only one juror admitted racial bias against Mexican-Americans (S.F. 42-44). The inherently inhibiting and intimidating nature of peer pressure, such as that operating on a large panel of prospective jurors, made it unlikely that individual veniremen would candidly respond to sensitive questions addressed to the panel as a whole. Fear of exposure, embarrassment and informal censure possibly deriving from a public admission of prejudice or bais rendered the en masse probing ineffectual. While the trial court has discretion to control the voir dire examination, the discretion is abused when the defendant's privilege of examining the veniremen individually is denied.

In *De La Rosa v. State*, 414 S.W.2d 668 (1967), the Court held that a 30 minute limitation on individual voir dire examination was reversible error. In *De La Rosa*, as in the instant case, Appellant's counsel "requested the Court to allow him to propound approximately fifteen questions which he set out in his motion." *De La Rosa* at 670; (S.F. 35-37). In *De La Rosa* as well as the intant case, there was no attempt to prolong the voir dire with irrelevant, immaterial or unnecessarily repetitious questions. *De La Rosa* at 671; (S.F. 38-80). The Court recognized in *De La Rosa* that effective voir dire examination is an essential element of the right to jury trial, stating that:

> [t]he voir dire process is designed to insure—to the fullest extent possible—that an intelligent, alert and impartial jury will perform the duty assigned to it by our judicial system.

Id. at 671. Moreoever, the Court noted that "(i)t is well-established by numerous decisions of this Court that (the) constitutional guarantee of the right to be represented by counsel carries with it the right of counsel to *interrogate the members of the jury panel*" (emphasis supplied), so that peremptory challenges might be effectively exercised. See also *Mathis v. State*, 322 S.W.2d 629, 639

(1959). Due process violations of the state and federal constitutions are also implicated by the conduct of the trial court in this case. *Abron v. State*, 528 S.W.2d 405 (1975). "Any system for empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of (the right to challenge veniremen) must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894). Thus, Appellant's constitutional rights to counsel, trial by jury, and due process of law were infringed by the trial court's actions in this case.

The court in *De La Rosa* explicitly rejected the distinctiocn between a trial court's prohibition of proper substantive questioning and a trial court's limitation of the *method* of questioning, by observing that

> [t]he unrealistic time limitation here imposed had the same effect, however, of *depriving the appellant* of *asking the prospective jurors individually proper and pertinent questions.* (Emphasis supplied)

Id. at 672. The duty of the trial court to confine the voir dire examination to reasonable limits, the Court noted,

> does *not* carry with it, however, the authority to refuse appellant's counsel the *privilege of examining each juror individually* within reasonable limits. (Emphasis supplied)
>
> *Id.* at 672.

The case of *Plair v. State*, 102 Tex.Cr.R. 628, 279 S.W. 267 (1926) in on all-fours with the instant case. There, the defendant was similarly alleging that the trial court erred in refusing to permit him to examine individually each of the prospective jurors in order that he might intelligently exercise his peremptory challenges. The defendant especially complained that the trial court refused to permit him to ask each of the jurors *separately* whether they had any racial prejudice. Holding that the trial court's action in refusing the individual examination and substituting in its place collective interrogatory was

reversible error, the Court acknowledged the type of peer pressure inherent in large panels of prospective jurors:

> We think no case can be found in the state where it has been held permissible for the trial court to refuse to allow counsel to examine the jurors individually as to their qualification. *We think the distinction is clear between an examination of this character and the mere asking of jurors the same questions in a group. There is a certain degree of timidity and diffidence about some jurors that would be calculated to cause them to remain silent unless personally called upon* to answer any question. Again we think it clear that the right to appear by counsel carries with it the right of counsel to interrogate each juror individually, to the end that he may form his own conclusion *after this personal contact with the juror* as to whether, in the counsel's judgment he would be acceptable to him, or whether on the other hand he should exercise a peremptory challenge to keep him off the jury. (Emphasis supplied)

Id. at 269. The fact that the trial judge in the instant case was willing to allow Appellant to pursue responses individually if such a response resulted from the group voir dire does not distinguish the instant case from *Plair*. The trial judge in *Plair* propounded questions to the jurors collectively, "with an admonition that the questions were directed to each individually, and for any one to speak up and answer, *which was done*." *id.* at 268 (Emphasis supplied). This procedure was nonetheless held to be reversible error. *In accord*, *Naugle v. State* 40 S.W.2d 92, 94 (1931); *Carlis v. State*, 51 S.W.2d 729, 730 (1932).

De La Rosa has been consistently and frequently cited by this Court and was affirmed in *Hernandez v. State*, 508 S.W.2d 853, 854 (1974); *Barrett v. State*, 516 S.W.2d 181, 183 (1974)(Onion, P.J., dissenting). And *Plair* was

reaffirmed as recently as April 5, 1978 in *Trevino v. State*, 572 S.W.2d 336 (No. 54,148).

For the reasons stated, the cause should be reversed and remanded.

STATE'S COUNTERPOINT NO. 6

(In Reply to Appellant's Ground of Error No. 6)

NO ERROR WAS COMMITTED DURING THE VOIR DIRE OF THE PROSPECTIVE JURORS.

The Appellant next states that the trial judge unreasonably restricted the voir dire examination. More specifically, he contends that "... the trial judge forbade the directing of questions to panel members individually . . ." (Brief p. 23).

Prior to the voir dire examination, the trial judge ruled, as follows:

> You may ask these questions collectively of the jurors as a group and if there is an individual response in the affirmative or negative from any individual juror, then you may proceed with a follow-up question of that particular juror.' (S/F 37-38).

Thus, the defense was not, in fact, prohibited from asking the individual jurors any specific questions. Moreover, the record reflects that some veniremen were also questioned outside the hearing of the others. (S/F 42, 53, 54, 55, 62, 64). The record also shows that the defense was permitted to individually question the veniremen when they responded to the general questions. (S/F 65 et. seq.).

As stated in *Abron v. State*, 523 S.W.2d 405 (Tex.Cr.App. 1975): "This Court has consistently held that the trial court has wide discretion over the course of the voir dire of the jury panel." The procedure followed in the present case did not constitute an abuse of discretion by the trial court. See *United States v. Arlt*, 567 F.2d 1295 (5th Cir. 1978); see also the cases collated at 25 Texas Digest, Jury, Section e31(13).

APPENDIX D - EXCERPT FROM STATE'S ORIGINAL BRIEF

GROUND OF ERROR NO. 6

In this ground, appellant complained of the court's refusal to permit questioning of *individual* veniremen as to questions such as ethnic prejudice during his voir dire examination of the entire venire panel as a group. The trial court had ruled that such examination would not be allowed unless indicated by specific responses to the examination of the venire panel as a whole. Appellant cited cases reversed for refusal to permit the asking of certain questions, *e.g.*, *Emanus v. State*, 526 S.W.2d 806 (1975), *Florio v. State*, 568 S.W.2d 132 (1978), as well as cases reversed for imposition of other limitations on the voir dire examination, *e.g.*, *De La Rosa*, 414 S.W.2d 668 (1967)(30 minute time limitation), *Plair v. State*, 279 S.W. 267 (1926)(veniremen could not be questioned individually unless they made a particular response to group interrogatories).

THE PANEL OPINION MISSED THE BOAT

Incredibly, the panel either deliberately ignored or misunderstood 1) what actually happened in the trial court, 2) the totality of appellant's argument on appeal, and 3) all of the cases in the second category cited above. The undersigned writer reaches this conclusion, in part, by noting the court's reliance on *Johnson v. State*, 447 S.W.2d 927 (1970), *Brantley v. State*, 522 S.W.2d 519 (1975) and *Wechsler v. State*, 361 S.W.2d 379 (1962) which held that voir dire examination of individual veniremen separate and apart from the rest of the panel is only appropriate in capital murder cases. This is indeed the law but this is *NOT* appellant's complaint on this appeal. The cases cited by the panel have nothing whatsoever to do with this case.

The panel's failure to address the issue actually raised in the appeal is all the more surprising since appellant informed the panel at oral argument on January 14, 1981, that Ground of Error 6 was his strongest ground. At that time, the panel propounded numerous questions to

counsel for both parties on this issue. Both parties filed post-argument briefs specifically addressing the difficult question presented in Ground of Error No. 6. The panel opinion is silent on both the facts and the law which both parties heretofore understood were presented by this ground of error.

APPELLANT'S GROUND RESTATED

As the panel opinion noted, appellant was permitted to ask his question about ethnic prejudice (of the venire as a whole). The panel therefore held that appellant's voir dire examination was not unduly limited, citing *Emanus v. State, supra.* But the panel did not consider whether appellant could direct his proper question to each member of the panel *individually*, during the group voir dire, or whether the court could require appellant to direct it to the venire as a whole, addressing only those specific veniremen who responded to the general interrogatory. This was the question presented both in this case and in *Plair v. State*, 279 S.W. 267 (1926). It would serve no purpose to recite pages of the trial record and appellate briefs to identify this question again; it is unmistakably preserved in the trial court and assigned as error in the briefs already on file with this Court.

MERITS OF APPELLANT'S ARGUMENT
GENERAL AUTHORITY

Voir Dire examination in non-capital cases in Texas has always included the right of counsel to propound proper questions to each individual member of the jury panel. *Plair v. State*, 279 S.W. 267 (1926)(on Rehearing).

> The right to appear by counsel is guaranteed by the (Texas) Bill of Rights, and carries with it the right of counsel, within reasonable limits to examine *each juror individually* in order that he may prepare himself for the exercise of the peremptory challenges allowed that appellant by statute. Article 1, § *10,*

Constitution of Texas, article 3, C.C.P. 1925; (citations omitted).

Carlis v. State, 51 S.W. 2d 729, 730 (1932)(emphasis supplied).

> It has been long the holding of this court that the constitutional guarantee of the right to be represented by counsel (Bill of Rights, Art. 1, Sec. 10, Vernon's Ann.St.Const.) carries with it the right of counsel to interrogate the members of the jury panel to the end that he may form his own conclusion, *after his personal contact with the juror*, as to whether in counsel's judgment he would be acceptable to him or whether, on the other hand, he should exercise a peremptory challenge to keep him off the jury. (citations omitted).

Mathis v. State, 322 S.W.2d 629, 631 (1959)(emphasis supplied) quoted by Judge Odom in *Abron v. State*, 523 S.W.2d 405, 408 (1975).

> [T]he right to appear by counsel carries with it the right of counsel to interrogate each juror *individually*, to the end that he may form his own conclusions after this personal contact with the juror as to whether, in the counsel's judgment, he would be acceptable to him, or whether on the other hand he should exercise a peremptory challenge to keep him off the jury.

Plair v. State, *supra* (emphasis supplied), quoted by Judge Dally in *Mathis v. State*, 576 S.W.2d 835 (1979). The right to individual questioning applies even if the questioning is repetitious.

> So long as the method of jury selection long used in this state prevails—as opposed to practice in federal court—defense counsel may not be precluded from the traditional voir dire examination because the

> questions asked are repetitious of those asked by the Court and prosecutor.

Mathis v. State, 576 S.W.2d 835, 839 (1979). If the Court within its discretion sets time limits on the voir dire examination, nevertheless,

> . . . within such limits the defendant may examine each prospective juror *individually* and pose questions about any proper area of inquiry.

Florio v. State, 568 S.W.2d 132 (1974)(per Odom, J.)(emphasis supplied).

MERITS OF APPELLANT'S ARGUMENT WHITE HORSE CASE

Plair v. State, *supra*, is on all-fours with the instant case. There, the defendant was similarly alleging that the trial court erred in refusing to permit him to examine *individually* each of the prospective jurors in order that he might intelligently exercise his peremptory challenges. The defendant especially complained that the trial court refused to permit him to ask each of the jurors *separately* (but during the group voir dire) whether they had any racial prejudice. Holding that the trial court's action in refusing the individual examination and substituting in its place collective interrogatory was *reversible error*, the Court acknowledged the type of peer pressure inherent in large panels of prospective jurors:

> We think no case can be found in the state where it has been held permissible for the trial court to refuse to allow counsel to examine the jurors *individually* as to their qualification. *We think the distinction is clear between an examination of this character and the mere asking of jurors the same questions in a group.* There is a certain degree of timidity and diffidence about some jurors that would be calculated to cause them to remain silent *unless personally called upon* to answer any question. Again we think it clear that the

> right to appear by counsel carries with it the right of counsel to interrogate each juror *individually*, to the end that he may form his own conclusion *after this personal contact with the juror* as to whether in the counsel's judgment he would be acceptable to him, or whether on the other hand he should exercise a peremptory challenge to keep him off the jury (emphasis supplied).

Id. at 269. The fact that the trial judge in the instant case was willing to allow appellant to pursue responses individually if such a response resulted from the group voir dire does not distinguish the instant case from *Plair*. The trial judge in *Plair* propounded questions to the jurors collectively, "with an admonition that the questions were directed to each individually, and for any one to speak up and answer," *which was done*." *id. at 268* (emphasis supplied). This procedure was nonetheless held to be reversible error.

This Court in *De La Rosa v. State*, 414 S.W.2d 668 (1967) reversed a conviction because the 30 minute time limitation for voir dire imposed by the trial court was not sufficient to accord the defendant his state constitutional right to counsel. The duty of the trial court to confine the voir dire examination to reasonable limits, the Court noted,

> does *not* carry with it, however, the authority to refuse appellant's counsel the *privilege of examining each juror individually* within reasonable limits. (emphasis supplied)

Id. at 672. *En masse* questioning of the entire panel is simply inadequate to ascertain factors such as intelligence, quickness, temperament, and subtle prejudices that individual questioning can pick up. Texas lawyers look for these qualities in picking a fair and impartial jury.

SUMMARY

The Court of Criminal Appeals, *en banc*, should consider the question raised by this appeal and should either distinguish or overrule *Plair* and *De La Rosa*. If the procedure actually employed by the trial court in this case really did receive express sanction by this Court, it would not be long before individual questioning of prospective jurors during group voir dire of the whole venire panel would be a thing of the past in Texas. Besides the major implications for voir dire practices in Texas contained in this appeal, there are also the rights of one individual criminal defendant to consider. The issues should not be avoided and buried in a *per curiam* opinion.